Supreme Court, U.S.
FILED
JUL 1 1989
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89-1.46

No. _____

IN THE

Supreme Court of the United States

October Term, 1988

PRODUCTION MACHINERY CORPORATION,
Petitioner,

vs.

RICHARD TANGO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of Ohio
For the Eleventh Appellate District

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I.

QUESTIONS PRESENTED FOR REVIEW

The Ohio Courts' interpretation that an employer is in violation of the state's prevailing wage statute when the employer uses its own employees to work on its own building, which is being renovated with the aid of industrial revenue bonds, even though the employer does not pay its employees with funds from the industrial revenue bonds, is a constitutional interference with the liberty of contract as guaranteed by paragraph 1 of Article I of the Ohio Constitution as well as the Fourteenth Amendment to the Constitution of the United States.

SECOND ISSUE FOR CONSIDERATION

The penalty section in Ohio Revised Code 4115.10 as applied to the Petitioner, has no relationship in the protection of public health, morals, and safety and is an impermissible abuse of the police power.

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PETITION FOR WRIT OF CERTIORARI
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For the Eleventh Appellate District

The Petitioner, PRODUCTION MACHINERY CORPORATION respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Ohio for the Eleventh Appellate District entered in this proceeding on January 3, 1989.

OPINION BELOW

The opinion of the Court of Appeals of Ohio, Eleventh Appellate District, unreported, appears in the Appendix hereto. Also included in the Appendix is the judgment of the Lake County Court of Common Pleas in favor of the Respondent from which the appeal was taken. No opinion was rendered by the Supreme Court of Ohio, which overruled a Motion to certify the Record.

PARTIES BELOW

The parties below include Production Machinery Corporation, Petitioner. The Respondent is Richard Tango, a former employee of the Petitioner. Any and all other parties to this litigation have been dismissed.

Production Machinery Corp. is a corporation for profit and there are no subsidiaries or holding companies involved therewith.

JURISDICTION

The judgment of the Court of Appeals of Ohio, Eleventh Appellate District, was entered on January 3, 1989 affirming a judgment for the Respondent entered on November 10, 1987. The Supreme Court of Ohio, in its discretion, pursuant to article IV, Section 2(B)(2)(d) of the Constitution of Ohio, overruled a motion to certify the record on April 12, 1989, and this petition for a writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Paragraph 1 of the Ohio Constitution:

> "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

Fourteenth Amendment to the U.S. Constitution:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

A claim for violation of Ohio's prevailing wage law is governed by R.C. 4115.10(A) which states in pertinent part,

> "[t]he employee may file suit for recovery within sixty days of the director of industrial relations' determination of a violation of sections 4115.03 to 4115.16 of the Revised Code or is barred from further action under this division."

"Construction" is defined as,

> any construction, reconstruction, improvement, enlargement, alteration, repair, or decorating of any public improvement . . . performed by other than full-time employees who have completed their probationary periods in the classified service of a public authority.

R.C. 4115.03(B).

R.C. 4115.10 Prohibitions

> ". . . Any employee upon any public improvement who is paid less than the fixed rate of wages applicable thereto may recover from any person, firm, corporation, or public authority that constructs a public improvement with its own forces the difference between the fixed rate of wages and the amount paid to him and in addition thereto a sum equal in amount to such difference. . . ."

R.C. 2305.11 Time Limitations for Bringing Certain Actions; Extensions; Effect of Legal Disability

> "(A) . . . or an action upon a statute for a penalty or forfeiture, shall be commenced within one year after the cause of action accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation shall be commenced within two years after the cause of action accrued."

STATEMENT OF FACTS

In 1981, Petitioner purchased the Columbia Match Company Building in Mentor, Ohio, with the intention of converting it into a modern office building. To this end, Petitioner hired employees as maintenance personnel. On October 22, 1982, Petitioner hired Richard Tango, Respondent, to work in the maintenance department. On December 15, 1982, Petitioner executed a $2,000,000.00 Industrial Revenue Bond to renovate and convert a large obsolete manufacturing building originally constructed in 1868 (hereinafter referred to as the "Project").

Although the loan agreement was executed between the City of Mentor and Petitioner, through a series of assignments the City of Mentor is effectively eliminated from the transaction, and the money is borrowed from and paid back to Bank One, Cleveland, N.A. There are no transactions between Petitioner, the City of Mentor, the State of Ohio, nor the Federal Government.

By qualifying as an Industrial Revenue Bond (hereinafter referred to as "IRB"), the interest income earned by Bank One from Petitioner on the loan is not fully subject to federal income tax. Thus, a lower interest rate can be charged to the Petitioner than would otherwise have been the case. Over the years it has been legally determined that IRB is considered a use of public funds and IRB projects are subject to the Ohio Prevailing Wage Law. It is important to note that neither federal nor state funds are used to pay for construction of the Project. The owner pays for construction, and receives reimbursement from the bank in the form of a loan which the owner is obligated to repay, in this case monthly, over a period of fifteen (15) years.

In practice, periodically, normally monthly, the owner will prepare a "draw" which is submitted to the bank listing the various vendors and suppliers and the amounts paid along with a certification. When this is paid by the bank to the owner, the amount is added to previous "draws" to arrive at a new note balance. Interest begins to accrue immediately based on the new balance.

General contractors employed by Appellant, *all of whose employees were paid the prevailing wage rate,* were:

Date	*Contractor*	*Amt. Paid*
12/15/82	Industrial Revenue Bond executed	
1/20/83	Contract to Capital Contractors to begin work, including removal of floor in tower, demolish office space, construction	$55,537.00
2/ 3/83	Capital Contractors begin work	983.00
5/13/83	Capital Contractors given contract for: gas well vault, construction of model suite	22,000.00
8/23/83	Contract to Alpine Heating to convert from steam to boiler heat, including removal of steam pipe	45,500.00
8/ 8/83	Capital Contractors demolished atrium	48,800.00
9/21/83	Capital Contractors demolished tower wall	7,300.00
9/23/83	Alpine Heating ordered air-conditioning equipment	52,200.000

Date	*Contractor*	*Amt. Paid*
10/21/83	Contract to Capital Contractors for:	
	1. demolish handicap ramp)	
	2. brick removal)	44,440.00
	3. demolish & reconstruct exit)	
	4. redo parking lot	34,470.00
11/ 9/83	Capital Contractors—redo roof	19,800.00
11/14/83	Capital Contractors—new boiler room	8,320.00
12/17/83	ABC Piping—demolish and install new sprinklers on first floor	23,000.00
12/20/83	Capital Contracts—construct atrium and toilets	238,410.00
12/20/83	Debmar Electric—electrical work	42,900.00
1/18/84	Capital Contractors—constructed first office space	49,900.00
2/ 7/84	Debmar Electric—lighting	36,000.00
2/10/84	Capital Contractors—construct PM and tenant space, including painting, drywall	110,150.00
3/84	Skylight installed	40,000.00
6/28/84	Alpine Heating—installed second and third floor air conditioning	82,000.00
7/11/84	Capital Contractors:	
	1. constructed banquet room	56,000.00
	2. constructed VWV tenant space	37,800.00

In addition to the above mentioned contractors, the following contractors were also employed by Appellant for work on the building, all of whom were paid pursuant to the terms of the IRB:

Contractor	*Amt. Paid*
CKS	41,100.00
Carroll Glass	13,585.65
Commercial Gas Boiler	2,920.00
Glazing Systems	6,000.00
Hi-Lite Maintenance	3,626.00
Robert C. Jones	393.00
Kotecki Monuments	532.50
Larkins Plumbing	13,788.40
R. M. Lederer Paving	22,600.00
Mentor Electric Supply	373.98
Mill Distributors	1,097.86
National Electrocoatings	9,501.94
Naturalite, Inc.	22,000.00
North American	3,543.42
Perlash Enterprises	8,305.00
Preferred Landscaping	6,843.00
Carl Ritts	1,112.73
Sherway Application Co.	110,469.00
Sullair Rentals	7,200.00
Tri-County Fence	1,370.00
Wallingford Roofing	300.00
Westinghouse	37,882.00

Testimony at the trial level indicated that the Respondent was hired as a maintenance man and that during his entire stay at Production Machinery did miscellaneous menial jobs at the company's site. Testimony at trial indicated that the Respondent, with others from the maintenance department, sandblasted at the renovated building site, removed steam pipe, assisted at work on the electrical system, and in general worked to keep the building safe, operational, and to prevent damage during the time that the major renovation was being completed by the primary contractor and the varying sub-trades. During his employ, the Respondent helped to demolish unsanitary and unsightly rest rooms, and did, in fact, with other employees, "jackhammer" the entrance way. In addition, Respondent was involved in working around an old gas well area. On occasion, Respondent would help a sub-trade should his talent be required. At no time, however, did the Respondent ever become a borrowed servant, and at all times was subject to the control of the company supervisor and was always paid by the Petitioner.

In 1985 Respondent Richard Tango, brought a five-count civil action for monetary damages pursuant to Ohio Revised Code Section 4115, *et seq.* against the Petitioner, Production Machinery Corporation. A trial was had to the Lake County Court of Common Pleas. Evidence at the trial indicated that all contractors, both general and subcontractors were paid the prevailing wage out of a $2,000,000 industrial revenue bond for the renovation of the Petitioner's office building. The Respondent, Richard Tango, was directly employed by Production Machinery Corporation and did some peripheral work in the building's renovation, which became the focal point of the trial court's action. At the time of trial, three fundamental issues were raised as defenses:

1. Was a company employee exempt from the provisions of ORC 4115, et seq;

2. Was the application of the penalty provision of Ohio Revised Code Section 4115, et seq constitutional?

3. Was the interpretation of the Ohio Statute of Limitations so applied to the petitioner as to deprive him of his due process property rights?

On November 10, 1987 the court entered its findings ordering the petitioner to pay the sum of $14,108.00 in violation of the prevailing wage law; the additional sum of $14,100 as a penalty for failure to pay the prevailing wage rate; and the sum of $10,540.38 as attorney fees. The matter was timely appealed to the Ohio State Eleventh District Court of Appeals, on the following Assignments of Error:

FIRST ASSIGNMENT OF ERROR:

The Trial Court erred in not finding that the Appellee, Richard Tango, was exempt from the provisions of Ohio Revised Code, Section 4115.03.

SECOND ASSIGNMENT OF ERROR:

The Trial Court improperly applied Section 4115.10(A) of the Ohio Revised Code when it should have applied Section 2305.11(A) of the Ohio Revised Code in determining when Appellee Richard Tango's purported claim for prevailing wage began.

THIRD ASSIGNMENT OF ERROR:

Appellee Richard Tango failed in his burden of proof in the dual aspect of the State of Ohio's testimony and this Appellee's testimony.

FOURTH ASSIGNMENT OF ERROR:

The Trial Court abused its discretion in assessing the penalty award and failed to apply the mandates of Section 2305.11 of the Ohio Revised Code.

On January 3, 1989, the judgment of the trial court was affirmed. Thereafter, the matter was timely appealed to the Ohio State Supreme Court pursuant to a request to the court to certify its record. The motion to certify the record was overruled on April 12, 1989.

REASONS FOR GRANTING THE WRIT

Acceptance of this case by the United States Supreme Court will have profound effect on various aspects of Ohio's prevailing wage law, which is somewhat akin to the federal version of the Davis-Bacon Act. If this Court permits the within decision to stand, employers throughout the country will never have peace from "prevailing wage" litigation. The magnitude of the effect on those engaged in public works projects is difficult to overestimate. Whereas, the right of the state to enforce "prevailing wages" on contractors employed on a project will be conceded. Nevertheless, where the power of the state invades the right of the owner to use his own employees on a construction project at less than prevailing wage, then the power becomes abusive and confiscatory. Within the question for review is the even more subtle violation of property rights, namely abuse of the statutes of limitations.

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together." *Wood v. Carpenter,* 101 U.S. 135, 139 (1879).

Statutes of limitations . . .

> "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to

> prevail over the right to prosecute them." *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944).

United States v. Kubrick, 444 U.S. 111, 117 (1979).

Ohio employers and owners are entitled to know that, at some point, they will have peace from "prevailing wage" actions. When does that point arrive? According to the Ohio courts, the answer is "never." This means that a Sword of Damocles hangs over an employer's head for an undetermined period.

Further constitutional clarification is needed on issues relating to minimal wage and other exemptions as applicable to this thorny subject. As the Ohio decisions now exist, employees will never be required to assert their prevailing wage claims within any specified period. The magnitude of the effects of those engaged in public work projects in the country is difficult to overestimate. Furthermore, potential purchasers of firms engaged in public works will be unable to estimate with reasonable certainty the risk of threatened litigation. For, if no Statute of Limitations applies to "prevailing wage" claims, such claims may be dormant for years, only to raise their head at some unpredictable point. As the Statute of Limitations has now been construed, there is no way to evaluate remote, contingent claims.

In addition to all of the above, Ohio statutes relating to the Prevailing Wage Act provide that should the plaintiff prevail in a wage case, a penalty equal to the size of the judgment, plus attorney fees, shall be assessed against the losing part. It is the contention of the Petitioner that this statutory provision imposing a penalty upon the exercise of a right to contract is an interference with that right and with the liberty and rights of the parties to acquire and possess property as guaranteed by Article I of the Ohio Constitution.

CONCLUSION

Based upon the foregoing, the Writ should be granted.

Respectfully submitted,

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APPENDIX

ENTRY OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY

(Dated April 12, 1989)

Case No. 89-366

THE SUPREME COURT OF OHIO

RICHARD TANGO,
Appellee,

v.

PRODUCTION MACHINERY CORPORATION,
Appellant.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Lake County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Paul H. Hentemann.

(Court of Appeals No. 13019)

/s/ THOMAS J. MOYER
Chief Justice

OPINION OF THE COURT OF APPEALS OF LAKE COUNTY, OHIO

(Filed January 3, 1989)

Case No. 13-019

COURT OF APPEALS

ELEVENTH DISTRICT
LAKE COUNTY, OHIO

RICHARD TANGO,
Plaintiff-Appellee,

vs.

PRODUCTION MACHINERY, aka
PRODUCTION MACHINERY CORP.,
Defendant-Appellant.

OPINION

CHARACTER OF PROCEEDINGS:
Civil Appeal from Common Pleas Court Case No. 85-CIV-0543

JUDGMENT: Affirmed.

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FORD, *P.J.*,

Defendant-appellant, Production Machinery Corp., appeals the judgment of the Lake County Court of Common Pleas rendered November 12, 1987 in which its employee, plaintiff-appellee Richard Tango, was awarded money damages and attorney's fees for appellant's failure to pay appellee the prevailing rate of pay for the renovation of appellant's building.

Appellant Production Machinery Corp. hired appellee Richard Tango in October 1982 to work at a recently purchased building owned by the appellant. Appellee's rate of pay was $4 per hour.

In December 1982, appellant executed an industrial revenue bond by contract with the City of Mentor, Ohio to obtain the finances for the necessary repairs and renovation of the building. During the next four months, the appellee performed various tasks, such as sandblasting, fixture removal, electrical repair, plumbing, jackhammering, and debris removal. He also removed a water tank from the top of a water tower. Appellee's work was satisfactory and he was given a raise and appointed the group leader.

In March 1985, the Ohio Department of Industrial Relations determined that the appellee was not paid the prevailing wage while working on the project. Appellee commenced a lawsuit for money damages in the Lake County Court of Common Pleas on May 3, 1985 against the appellant, the city of Mentor, and the Department of Industrial Relations. Appellee dismissed the action against the latter defendant on June 6, 1985.

At the bench trial, appellee was awarded approximately $28,000 plus attorney's fees in excess of $10,000. Appellant has timely appealed that decision, raising four assignments of error:

I. THE TRIAL COURT ERRED IN NOT FINDING THAT THE APPELLEE, RICHARD TANGO, WAS EXEMPT FROM THE PROVISIONS OF OHIO REVISED CODE, SECTION 4115.03.

II. THE TRIAL COURT IMPROPERLY APPLIED SECTION 4115.10(A) OF THE OHIO REVISED CODE WHEN IT SHOULD HAVE APPLIED SECTION 2305.11(A) OF THE OHIO REVISED CODE IN DETERMINING WHEN APPELLEE RICHARD TANGO'S PURPORTED CLAIM FOR PREVAILING WAGE BEGAN.

III. APPELLEE RICHARD TANGO FAILED IN HIS BURDEN OF PROOF IN THE DUAL ASPECT OF THE STATE OF OHIO'S TESTIMONY AND THIS APPELLEE'S TESTIMONY.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN ASSESSING THE PENALTY AWARD AND FAILED TO APPLY THE MANDATES OF SECTION 2305.11 OF THE OHIO REVISED CODE.

The issue before this court with respect to the first assignment of error is whether the nature of appellee's employment brought it within the strictures of Chapter 4115 of the Revised Code requiring payment of the prevailing wage rate, or whether it was within one of the stated statutory exceptions contained in that chapter that dispenses with that directive when maintenance work is involved. Appellant asserts that the trial court should have determined that appellee was exempt from those provisions and that, therefore, he was not entitled to be paid the prevailing wage for his employment with the appellant. Specifically, the appellant argues that the appellee performed only maintenance at the renovation site rather than construction work. Since maintenance work is exempt from Chapter 4115 of the Revised Code, prevailing wages need not be paid to anybody doing this type of work.

In its judgment entry of November 12, the trial court found that "*** the unchallenged fact remains that Tango did engage to an appreciable degree in project related activities at significant benefit to [appellant] PMC in the form of sandblasting, jackhammering of concrete, painting, removal of debris, walls, plumbing, conduits and other fixtures (including a tower water tank by asceting [sic] torch), installing a steel I-beam, lowering a staircase and placing visqueen."

Appellant is challenging the factual determination by the court that the appellee, while working on the project, was engaged in the type of work which requires that the prevailing wage be paid.

It is not the province of this court to re-try the issues previously adjudicated by the trial court or to substitute our opinion of the credibility of the witnesses for that of the trier of fact. *In re Lieberman* (1955), 163

Ohio St. 35. Appellant, in essence, would have this court hold that the type of work performed by appellee was maintenance, rather than construction work.

The trial court determined that during the period of time appellee worked for the appellant, his labor fell into six categories, five of which were activities not related to the renovation of appellant's building. The court even stated that one of the five categories not related to the renovation could be classified as general maintenance duties. Thus, although the trial court acknowledged that the appellee did perform some maintenance on the building, it found that the sixth category reflected the amount of time appellee was employed at the project site performing work which required that the prevailing wage be paid.

The record before us on this subject indicates adversarial evidence on this issue. Nevertheless, evidence was presented to the trial court, which, if believed, would support the trial court's conclusion regarding the sixth category of appellee's employment and the specific items on page three of its judgment entry it found were construction activities performed by the appellee.

As long as some competent, credible evidence exists with which to support the decision, we will not disturb the decision of the trial court. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St. 2d 279. The first assignment of error is not well taken.

Appellant asserts in its second assignment of error that the trial court erred in finding in favor of the appellee because it contends that the appellee's claim is barred by the applicable statute of limitations.

Appellant claims that R. C. 2305.11 is applicable here and that any testimony regarding money damages which might have occurred prior to the date that the appellee filed his complaint would be precluded by the statute of limitations.

In *Harris v. J.A. Schultz & Son, Inc.* (July 17, 1987), Wood App. No. WD-86-81, unreported, the Department of Industrial Relations of the State of Ohio filed a complaint against an employer, claiming that the prevailing wage in a public project had not been paid. The trial court granted summary judgment to the employer on the basis that the statute of limitations found in R.C. 2305.11 precluded recovery.

Upon appeal, the Sixth District Court of Appeals reversed the trial court, holding that R.C. 2305.11 does not apply when the nonpayment of the prevailing wage rate is at issue.

> "The maxim of *expressio unius est exclusio alterius* means that the mention of one thing implies the exclusion of another. *Erie Cty. Bd. of Edn. v. Rhodes* (1984), 17 Ohio App. 3d 35, 38; *Green, Inc. v. Smith* (1974), 40 Ohio App. 2d 30, 32; 50 Ohio Jurisprudence 2d (1961) 165, Statutes, Section 188. This maxim is to be used as an aid in determining legislative intent. 50 Ohio Jurisprudence 2d (1961) 167, Statutes, Section 189. When this maxim is applied to R.C. 2305.11 it appears that the intent of the legislature was not to include violations of the prevailing wage act under this statute of limitations. The express mention of specific violations to which it does apply implies that violations of the prevailing wage act were intentionally excluded by the legislature." *Harris, supra*, at 3.

We find this rationale to be convincing and hold that pursuant to *Harris*, R.C. 2305.11 is inapplicable in an action for money damages based on a claim for the

nonpayment of prevailing wages when a project funded in part by the issuance of industrial revenue bonds pursuant to R.C. 4115.03 is involved. The second assignment is without merit.

Appellant next asserts that the appellee did not meet his burden of proof at the trial. It states that the appellee supplied no competent evidence to support his contention that he should have been paid the prevailing wage. The record reflects that the appellee's testimony may have been wanting on some points. The trial court in fact referred to his selective recall as to the specifics of aspects of his employment. However, this does not mean that he did not meet his burden of proof in establishing the nature of his employment for purposes of compensation at the prevailing wage rate through portions of his testimony and other evidence offered on this subject.

The fact that the appellee could not recall when and for how long he performed various aspects of his employment does not negate the substance of the evidence produced by him to demonstrate the type of work performed by him for which the prevailing wage should have been paid. The tenor of his testimony does indicate that he did not specifically document the type of functions he performed.

The specific details of appellee's employment were substantiated and corroborated by the testimony of his immediate supervisor who testified that the appellee sandblasted, used a jackhammer, removed debris and old fixtures, and painted parts of the building.

Because of the state of the record before this court, we cannot say that the appellee did not meet his burden of proof to establish that he was entitled to be

compensated at the prevailing wage rate based on the nature of the work he performed. The third assignment is also without merit.

Lastly, appellant claims that the trial court abused its discretion in assessing the penalty imposed, and by not applying R. C. 2305.11.

This contention of the appellant's has already been addressed in large part in our discussion under the second assignment of error. R.C. 2305.11 is inapplicable.

R. C. 4115.10(A) states in part that:

> "Any employee upon any public improvement who is paid less than the fixed rate of wages applicable thereto may recover from such person, firm, corporation, or public authority that constructs a public improvement with its own forces the difference between the fixed rate of wages and the amount paid to him and in addition thereto a sum equal in amount to such difference."

Appellant asserts that even if the appellee was entitled to the prevailing wage, the provision providing for the doubling of the difference between the prevailing wage and the wage paid to him is a penalty provision subject to a one year statute of limitations. Appellant provides no authority for this proposition and fails to demonstrate that the court's attitude was unreasonable, arbitrary or unconscionable. Therefore, we find no abuse of discretion here. *State v. Adams* (1980), 62 Ohio St. 2d 151; *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217. This assignment is without merit.

For the foregoing reasons, the judgment of the trial court is affirmed.

/s/ DONALD R. FORD
Presiding Judge

CHRISTLEY, *J.*

STILLMAN, *J.* Ret.,
Eighth Appellate District,
sitting by assignment for
HON. ROBERT E. COOK, *J.*,

concur.

JUDGMENT ENTRY OF THE COURT OF APPEALS OF LAKE COUNTY, OHIO

(Filed January 3, 1989)

Case No. 13-019

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

RICHARD TANGO,
Plaintiff-Appellee,

vs.

PRODUCTION MACHINERY, aka
PRODUCTION MACHINERY CORP.,
Defendant-Appellant.

JUDGMENT ENTRY

For the reasons stated in the opinion of this court, the assignments of error are without merit, and it is the judgment and order of this court that the judgment of the trial court is affirmed.

/s/ DONALD R. FORD
Presiding Judge for the Court

STILLMAN, *J.*, Ret.,
sitting by assignment.

OPINION AND JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Dated November 10, 1987)

Case No. 85 CIV 0543

IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

RICHARD TANGO,
Plaintiff,

vs.

PRODUCTION MACHINERY, aka
PRODUCTION MACHINERY CORPORATION, *et al.*,
Defendants.

OPINION AND JUDGMENT ENTRY

This action is brought by plaintiff Richard Tango against Production Machinery Corporation [hereinafter "PMC"] and City of Mentor for alleged violations of Ohio's prevailing wage statute. A bench trial was held October 14-15, 1986 with final briefs submitted December 24, 1986.

Tango was hired by PMC on October 27, 1982 as an unskilled $4.00 per hour maintenance worker. Subsequent $1.00 per hour raises were given March 14, 1983 and August 20, 1984.

His duties included whatever the boss ordered, including trade labor. Sometime early 1982, PMC began renovation of the old Mentor Matchworks [hereinafter

"project"] using its own employees. On December 15, 1982, PMC obtained $2,000,000.00 in industrial bonds to finance the project. Shortly thereafter, Capital Contractors was hired as general contractor. It hired Alpine Heating, ABC Piping and Debmar Electric. Throughout the project, PMC employees, including Tango, performed various duties alongside trade workers.

Upon complaint and investigation, the Ohio Department of Industrial Relations determined, on March 4, 1985, *inter alia*, that Tango was not paid the prevailing wage and was due $51,377.32, thereafter corrected on February 18, 1986 to $40,072.16.

Excluding time spent on the Legend Lakes and Windmill projects, periods of injury and 3% non-project time, Tango contends the balance was project time and compensable according to Ohio's prevailing wage law.

PMC and City of Mentor contend significantly more time is excluded, the statute of limitations bars pre-May 6, 1983 project work, PMC employees are statutorally exempt, maintenance work is exempt by case law and payment from non-project funds is exempt.

A claim for violation of Ohio's prevailing wage law is governed by R.C. 4115.10(A) which states in pertinent part,

> [t]he employee may file suit for recovery within sixty days of the director of industrial relations determination of a violation of sections 4115.03 to 4115.16 of the Revised Code or is barred from further action under this division.

The filing on May 3, 1985 by Tango is well within sixty days of the March 4, 1985 determination of the director of industrial relations as specified by R.C. 4115.10(A). Hence, the action is timely commenced.

In Ohio, receipt of industrial revenue bond financing requires payment of prevailing wage to all workers, union and nonunion alike unless otherwise exempt, engaged in any construction work on a public project. *Donahue v. Cardinal Construction Co.* (1983), No. 1875 Wayne County, unreported; 1977 Ohio Atty. Gen. Ops. No. 77-076, at 2-268; 1982 Ohio Atty. Gen. Ops. No. 82-096, at 2-263. "Construction" is defined as,

> any construction, reconstruction, improvement, enlargement, alteration, repair, or decorating of any public improvement . . . performed by other than full-time employees who have completed their probationary periods in the classified service of a public authority.

R.C. 4115.03(B).

Based on the cited law and facts, it cannot be debated that this project constituted a public project within the meaning of Ohio's prevailing wage law. As such, all project related construction work must be paid in accordance with the prevailing wage law. Left for decision is whether and to what extend Tango performed specific project work within this context for which proper compensation was not made.

Common to the testimony of each witness were accounts of Tango laboring alongside tradesmen. Notwithstanding Tango's selective recall nor PMC's inability to account for time, significant detractors of each's credibility, the unchallenged fact remains that Tango did engage to an appreciable degree in project related activities at significant benefit to PMC in the form of sandblasting, jackhammering of concrete, painting, removal of debris, walls, plumbing, conduits and other fixtures (including a tower water tank by asceting torch), installing a steel I-beam, lowering a

staircase and placing visqueen. Tango's inexperience and lack of proficiency in each of these endeavors justifies qualifying him as a general "laborer" for purposes of computation.

Basically, Tango's endeavors during the relevant December 15, 1982 to August 24, 1984 period fall into six categories. The first five are non-related project activities which do not require prevailing wage compensation. First, is the off-site Legend Lakes project which involved approximately 70% of Tango's employment from April 20 to May 9, 1983. Second, is the on-site though unrelated Windmill project which likewise involved 70% of his employment from September 1983 to mid-March 1984. Third, is the over 200 daily errands documented by vouchers, receipts and expense reports which by conservative measures comprised one hour or 12.5% of each working day. Fourth, are injuries and workers' compensation leave which comprised roughly three weeks. Fifth, are Tango's general maintenance duties (ostensibly, the purpose of his employment) in PMC's offices, warehouse and grounds, i.e.: moving equipment, repairs, vehicle service, floor cleaning and particle control which comprised, on average, half of the unaccounted for time in categories one through four.

The sixth category, representing the remainder, reflects, the average percentage of time substantiated by credible evidence Tango was actually engaged in project related work for which payment in accordance with the prevailing wage law was to have been but was not made. Upon calculation, $14,108.00 in prevailing wages is due Tango from PMC.

In conclusion, judgment is hereby rendered in favor of Tango against PMC and City of Mentor, jointly and severally, in the sum of Fourteen Thousand One Hundred and Eight Dollars ($14,108.00) together with a like sum of Fourteen Thousand One Hundred Eight Dollars pursuant to R.C. 4115.10(A) for a total of Twenty-Eight Thousand Two Hundred Sixteen Dollars ($28,216.00) together with ten percent (10%) interest from February 18, 1986. Furthermore, pursuant to R.C. 4115.10(A), Tango is hereby awarded reasonable attorney fees, as stipulated, in the sum of Ten Thousand Five Hundred Forty Dollars and Thirty-Eight Cents ($10,540.38). Costs of this action are assessed against PMC and City of Mentor.

IT IS SO ORDERED.

/s/ JAMES W. JACKSON
Judge of the Court of Common Pleas

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No. 89-146

IN THE

Supreme Court of the United States

October Term, 1989

PRODUCTION MACHINERY CORPORATION,
Petitioner,

vs.

RICHARD TANGO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of Ohio
For the Eleventh District

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QUESTIONS PRESENTED FOR REVIEW

Application of the Ohio Prevailing Wage Statute to the employees of an employer who renovates its own building, partially with funding from industrial revenue bonds, is not a violation of liberty of contract as guaranteed by Paragraph I of Article I of the Ohio Constitution and the Fourteenth Amendment to the Constitution of the United States.

SECOND QUESTION FOR REVIEW

The penalty contained in Ohio Revised Code Section 4115.10 bears a substantial relationship to the protection and promotion of the general welfare and is not an abuse of the State's police power.

PARTIES TO PROCEEDING

Omitted under authority of Rule 34 of the Rules of the Supreme Court of the United States.

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OPINIONS BELOW

Respondent accepts Petitioner's statement regarding Opinions Below and incorporates by reference the Opinions Below appearing in the Appendix to Petitioner's Writ of Certiorari at pages A-1 through A-16 inclusive.

JURISDICTION

Respondent admits the Judgment of the Court of Appeals of Ohio, Eleventh Appellate District, after the refusal of the Ohio Supreme Court to accept jurisdiction, became a final appealable Order for the purposes of this appeal. However, Respondent asserts that this Honorable Court is without jurisdiction to grant Petitioner's Writ of Certiorari.

Petitioner alleges jurisdiction in this Honorable Court under 28 U.S.C., Section 1257(3). Section 1257 provides in pertinent part:

> "Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question, or the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States . . ."

A review of the questions presented in Petitioner's Petition for Writ of Certiorari will show that both questions presented for review by Petitioner allege violations of the Fourteenth Amendment of the United States Constitution. The first issue presented for review expressly alleges a violation of the Fourteenth Amendment of the United States Constitution. The second issue presented for review merely alleges an abuse of the police power. Respondent construes this allegation to constitute an allegation of a denial of equal

protection under the Fourteenth Amendment of the United States Constitution. However, Petitioner at page 15 of his Petition alleges:

> "It is the contention of the Petitioner that the statutory provision imposing a penalty on the exercise of a right to contract is an interference with that right and with the liberty and rights of the parties to acquire and possess property as guaranteed by Article I of the Ohio Constitution."

It is arguable that Petitioner's second question presented does not even allege an issue within the jurisdiction of this Honorable Court. Petitioner's issue for consideration does not allege any specific statute, treaty or constitutional provision of the United States Constitution which has been violated. Petitioner at page 15 of his Petition alleges a violation of the Ohio Constitution which is not a proper matter for review under 28 U.S.C., Section 1257(3).

Respondent asserts that this Honorable Court should decline jurisdiction under 28 U.S.C., Section 1257(3) as Petitioner never raised any Constitutional challenge to Ohio Revised Code Section 4115.10 in any of the lower courts. This Court has consistently declined jurisdiction in situations where the issues presented for review to this Honorable Court have not been raised or decided in the courts below. In *White River Lumber Company v. Arkansas Ex Rel. Applegate* (1929), 279 U.S. 692, this Honorable Court declined to consider the constitutionality of a state statute where no constitutional challenge to the statute had been raised or decided in the courts below. See also, *McGoldrick v. Compagnie Generale Transatlantique* (1939), 309 U.S. 430, and *Maybee v. White Plains Publishing Company* (1945), 327 U.S. 178.

Notwithstanding Petitioner's statements in its Petition for Writ of Certiorari, at pages 11 and 12, that he questioned the constitutionality of "the penalty provision", in Revised Code Section 4115.10 and further that he alleged a denial of due process regarding the conflict concerning the appropriate statute of limitations to be applied in the underlying action; Petitioner did not challenge the constitutionality of R.C. 4115.10 at trial or on appeal below.

While the record of the Trial Court is not before this Honorable Court, the assignment of errors as set forth on pages 12 and 13 of Petitioner's Petition for Writ of Certiorari clearly show the assignments of error in the Appellate Court did not address the constitutionality of the statute of limitations or the penalty provision of R.C. 4115.10. Further, the Opinion of the Trial Court, appearing at pages A-12 through A-16 of Petitioner's Petition for Writ of Certiorari, demonstrates that the constitutionality of R.C. 4115.10 and the statute of limitations and penalty provision thereunder were never raised or decided by the Trial Court.

Therefore, absent a challenge to the constitutionality of the penalty and/or statute of limitations provisions of Revised Code Section 4115 in the lower courts, Respondent asserts that this Honorable Court should decline jurisdiction in this matter, pursuant to 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Paragraph I of the Ohio Constitution:

"All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property and seeking and obtaining happiness and safety."

Fourteenth Amendment to the U.S. Constitution:

"1. . . . no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within in its jurisdiction equal protection of the laws."

"4115.10 Prohibitions.

(a) No person, firm, corporation, or public authority that constructs a public improvement with its own forces the total overall project cost of which is fairly estimated to be more than four thousand dollars shall violate the age provisions of sections 4115.03 to 4115.06 of the Revised Code, or suffer, permit, or require any employee to work for less than the rate of wages so fixed, or violate the provisions of section 4115.07 of the Revised Code. Any employee upon any public improvement who is paid less than the fixed rate of wages applicable thereto may recover from such person, firm, corporation or public authority that constructs a public improvement with its own forces the difference between the fixed rate of wages and the amount paid to him and in addition thereto a sum equal in amount to such difference. The employee may file suit for recovery within sixty days of the

director of industrial relations' determination of a violation of sections 4115.03 to 4115.06 of the Revised Code or is barred from further action under this division. Where the employee prevails in a suit, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(B) Any employee upon any public improvement who is paid less than the prevailing rate of wages applicable thereto may file a complaint in writing with the department of industrial relationship upon a form furnished by the department. At the written request of any employee paid less than the prevailing rate of wages applicable, the director shall take an assignment of a claim in trust for the assigning employee and bring any legal action necessary to collect the claim. The employer shall pay the costs and reasonable attorney's fees allowed by the court if the employer is found in violation of sections 4115.03 to 4115.16 of the Revised Code.

(C) If after investigation pursuant to section 4115.13 of the Revised Code, the director determines there is a violation of sections 4115.03 to 4115.16 of the Revised Code and sixty days have elapsed from the date of the determination, and if:

(1) No employee has brought suit pursuant to division (A) of this section;

(2) No employee has requested that the director take an assignment of a wage claim pursuant to division (B) of this section;

The director shall bring any legal action necessary to collect any amounts owed to employees and in addition thereto as a penalty an amount equal to the amounts so collected. The director shall pay over to the affected employees the amounts collected including the penalty amounts collected. In any action in which the director prevails, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(D) Where workmen are employed and their rate of wages has been determined as provided in section 4115.04 of the Revised Code, no person, either for himself or any other person, shall request, demand, or receive, either before or after such a workman is engaged, that such workman pay back, return, donate, contribute, or give any part or all of said workman's wages, salary, or thing of value, to any person, upon the statement, representation, or understanding that failure to comply with such request or demand shall prevent such workman from procuring or retaining employment, and no person shall, directly or indirectly, aid, request, or authorize any other person to violate this section. This division does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization.

(E) The department of industrial relations shall enforce sections 4115.03 to 4115.16 of the Revised Code."

STATEMENT OF THE CASE

On March 4, 1985, Respondent received from the Director of the Ohio Department of Industrial Relations, a determination notice that Respondent had been paid less than the prevailing wage for work performed at a public improvement site.

On May 3, 1985, Respondent commenced suit in Lake County Court of Common Pleas seeking money damages pursuant to Chapter 4115 of the Ohio Revised Code.

After bench trial, judgment was rendered in favor of Respondent on November 10, 1987. The Court awarded Respondent, Twenty-eight Thousand Two Hundred Sixteen Dollars ($28,216.00) plus reasonable attorney fees in the amount of Ten Thousand Five Hundred Forty Dollars and Thirty-Eight Cents ($10,540.38).

Petitioner filed its Notice of Appeal with the Eleventh District Court of Appeals for Lake County on November 19, 1987.

On January 3, 1989, the Eleventh District Court of Appeals unanimously affirmed the judgment of the Trial Court.

On January 27, 1989, Petitioner, Production Machinery Corporation, filed its Notice of Appeal in the Ohio Supreme Court. The Ohio Supreme Court overruled a Motion to Certify the Record in an Entry dated April 12, 1989, thereby declining to accept the case for review.

Petitioner now seeks to have the judgment of the Eleventh District Court of Appeals for Lake County, Ohio reversed based on certain alleged Constitutional violations which were not alleged below.

SUMMARY OF ARGUMENT

Petitioner is seeking to have this Court review the constitutionality of Section 4115 of the Ohio Revised Code. Section 4115 is the Ohio Prevailing Wage Statute.

Petitioner alleges the application of the Ohio Prevailing Wage Statute to Petitioner constitutes an interference with his liberty of contract as protected by the Fourteenth Amendment of the United States Constitution. Notwithstanding Petitioner's failure to raise this issue at trial, Respondent asserts that the Ohio Prevailing Wage Statute is Constitutional and is not an infringement on Petitioner's liberty of contract.

Petitioner cites no case law for the proposition that the Ohio Prevailing Wage Statute violates the liberty of contract as protected under the Fourteenth Amendment. In fact, Petitioner admits "whereas, the right of the State to enforce 'prevailing wages' on contractor's employed on a project will be conceded." This admission by Petitioner admits the constitutionality of prevailing wage statutes in general and merely challenges the application of the statute to the particular facts of the instant action. This is not a basis for a constitutional violation.

Petitioner as a second issue for review asserts that the penalty contained in Revised Code Section 4115.10 is an abuse of the police power. Respondent construes this issue to allege a denial of equal protection under the Fourteenth Amendment.

Again, Petitioner cites no case law in support of the proposition that the penalty provision of R.C. 4115.10 constitutes an abuse of the police power. Respondent asserts that the penalty, requiring an employer found in violation of Revised Code Section 4115.10 to pay the employee double the amount of the unpaid wages, constitutes a valid penalty in exercise of the police power and is in furtherance of the legitimate social and economic policies furthered by the Ohio Prevailing Wage Statute.

ARGUMENT

As set forth in the Jurisdictional Statement, Respondent urges this Court to decline jurisdiction in this matter. Notwithstanding Respondent's belief that this Honorable Court should decline jurisdiction in this matter, Respondent asserts Petitioner's questions presented for review are without merit and that the decision of the Eleventh District Court of Appeals for the State of Ohio should be affirmed.

The case at bar simply does not raise the issue of liberty of contract. Petitioner chose to apply for and accept industrial revenue bonds in partial financing of its improvements. Upon acceptance of the industrial revenue bonds, Petitioner was bound by the Ohio Prevailing Wage Statute. O.R.C., Section 4115.03. Petitioner's liberty of contract was not impaired as Petitioner was not required to accept industrial revenue bonds for the financing of its project. Petitioner was free to contract with its employee in any manner it wished until it accepted the funds of the industrial revenue bonds. Upon accepting these industrial revenue bond funds, Petitioner's project became a public improvement and therefore all employees, whether the employees of contractors, subcontractors or the Petitioner, became subject to the Prevailing Wage Statute applying to public works. Therefore, Petitioner's claims relating to a violation of the liberty of contract are without merit and should not be considered by this Honorable Court.

The standard to be applied in ruling on a liberty of contract claim was set forth by this Honorable Court in *Warehouse Company v. Tobacco Growers* (1927), 276 U.S. 71. The Court in *Warehouse Company* wrote:

> "The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest. The question is whether the restrictions of the statute have reasonable relation to a proper purpose. *Miller v. Wilson,* 236 U.S. 373, 380, *Lindsley v. Natural Carbonic Gas Company,* 220 U.S. 61, 78. A provision for a penalty to be received by the aggrieved party as punishment for the violation of a statute does not invalidate it. *St. Louis Iron Mountain & Southern Railway Co. v. Williams, et al.,* 251 U.S. 63, 66."

Application of the standard set forth in *Wilson, supra* demonstrates that Plaintiff's liberty of contract claim is without merit. The Prevailing Wage Statute at issue clearly furthers a legitimate government interest in promoting fair wages for employees involved in public works and insuring that they are compensated at the wage prevailing in the locality of the construction project.

Although the constitutionality of prevailing wage statutes has not been directly passed upon by this Court, the Court had the occasion to consider a prevailing wage provision in *U.S. v. Binghamton Construction Co.* (1953), 347 U.S. 171. The Court in *Binghamton*, although it had the opportunity to, did not invalidate the prevailing wage provision.

Treating Petitioner's constitutional claim regarding application of the Prevailing Wage Statute to Petitioner as an allegation of denial of equal protection, it is again apparent that Plaintiff's Constitutional claims under the Fourteenth Amendment are without merit. Treating Petitioner's First Question presented as an allegation that the statute is not invalid on its face, but rather is invalid in its application to Petitioner, the question

becomes whether the application of the statute to Petitioner denied Petitioner equal protection of the laws. As stated by this Honorable Court in *Snowden v. Hughes* (1943), 321 U.S. 1:

> "The unlawful administration of a state statute fair on its face, resulting in unequal application to those entitled to be treated alike, is not a denial of equal protection unless there is shown to be present an element of intentional or purposeful discrimination."

Applying the standard of *Snowden* to the case at bar, it is apparent that Petitioner's equal protection claims are without merit. Petitioner's claim is that the Court's decision, that Petitioner had violated the Ohio Prevailing Wage Law, constituted a denial of equal protection to Petitioner. Petitioner alleges that the application of the Ohio Prevailing Wage Law to Petitioner, for failure to pay its own employees the prevailing wage when they were involved in the construction of a public improvement, was a denial of equal protection. Petitioner does not allege nor does the record demonstrate, any allegation or evidence of intentional or purposeful discrimination. Therefore, the application of the Ohio Prevailing Wage Law to Petitioner cannot be a denial of equal protection. *Snowden, supra* at page 2. There is no allegation or demonstration that the application of the Ohio Prevailing Wage Law to Petitioner was done with an improper motive or in an unequal manner. *Yick Wo v. Hopkins* (1885), 118 U.S. 356, 374.

The penalty provision contained in the Ohio Prevailing Wage Statute is a valid application of the police power in furtherance of the State's right to regulate the disposition of public funds used on public projects. Given the validity of the Ohio Prevailing Wage Statute, as is conceded by Petitioner, the penalty

provision is a legitimate and rationally related method of enforcing the Prevailing Wage Statute. Double and treble damages are an accepted sanction under the law as evidenced by the antitrust laws of the United States. (The Clayton Act, 15 U.S.C.S., Section 15, *see also, Hanover Shoe, Inc. v. United Shoe Machinery Co.* (1968), 392 U.S. 481, *re-hearing denied* 393 U.S. 901). Petitioner's argument that the imposition of double wages as a penalty is an abuse of the police power is without merit and should not be accepted for hearing by this Honorable Court.

The constitutionality of a penalty, if properly applied in furtherance of the public policy of the statute, has been upheld by this Court so long as it is not unreasonable. As stated by the Court in *Warehouse Co., supra*: "A provision for a penalty to be received by the aggrieved party as punishment for the violation of a statute does not invalidate it."

Although Petitioner does not raise the issue of statute of limitations in his questions presented, Petitioner gives extensive treatment to it in his argument. The proper statute of limitation to be applied in an Ohio Prevailing Wage case is not a proper matter for review by this Honorable Court as it does not meet the jurisdictional requirements of 28 U.S.C., Section 1257(3).

This appeal presents no questions arising under the treaties or laws of the United States; no treaty or statute of the United States is drawn into question. As more fully set forth in Respondent's jurisdictional statement, the questions presented alleging constitutional violations were not raised or decided below and this Honorable Court should decline jurisdiction in this matter based on the authority of *White River Lumber, supra; McGoldrick, supra;* and *Maybee, supra.*

CONCLUSION

Based on the lack of any constitutional question, or other appropriate basis for jurisdiction in this Honorable Court, Respondent requests this Honorable Court to decline jurisdiction and to deny Petitioner's Petition for Writ of Certiorari. Additionally, or in the alternative, Respondent asserts that the Ohio Prevailing Wage Statute does not constitute a violation of the liberty of contract as provided in the Fourteenth Amendment of the United States Constitution and that the penalty provision contained in R.C. 4115.10 is rationally related to the enforcement of the Ohio Prevailing Wage Statute and does not constitute an abuse of the police power under the Fourteenth Amendment of the United States Constitution.

WHEREFORE, Respondent respectfully requests that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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